the two-year period in s 8 had expired. Further, within the first year since the issue of the writ, the 'Utrecht' had been within the jurisdiction for a number of times. The second defendant therefore applied by motion for, inter alia, an order that the amendment of the writ made without leave of the court be disallowed and service of the amended writ on the 'Utrecht' be set aside. The application was heard before Mocatta J. He considered the question of exercise of his discretion under the proviso to s 8 of the Maritime Conventions Act 1911 and not under O 20 r 5, the former conferring a wider discretion. He said, at pp 205-206:

> It was accepted by Mr Stone for the plaintiffs that whether or not the court would have allowed the writ to be amended by the addition of the Utrecht and the eight other sisterships would have depended upon whether the court thought fit to do so under the wide discretion conferred on it by the first limb of the proviso of s 8. Mr Staughton at one time, as I understood him, was inclined to argue that I should have regard merely to the rules of court and that the powers of the court under O 20 r 5 were very limited where an amendment affects rights which had accrued after a period of limitation had expired. This is no doubt true in a case to which s 8 of the Act of 1911 is inapplicable, but, where the section applies, the position is exceptional in that the very section imposing a period of limitation itself by the proviso grants a discretion to allow an extension of the period. In *The Espanoleto* [1920] P 223 at p 226; (1920) 3 L1 L Rep 91 at p 91, Mr Justice Hill said:
>
> 'In my judgment, when an application to extend the time for the renewal of a writ in an action which comes within s 8 is made, the matter is not to be disposed of merely by saying that the two years have elapsed and the claim is statute barred and no renewal can be granted. The application to renew must be considered on its merits, and the court must inquire whether the circumstances are such that the court would give leave to issue a writ, notwithstanding that the time had expired.'
>
> In his reply, Mr Staughton submitted that the discretion under s 8 was exercised on similar principles to those applicable at common law when considering whether the writ should be renewed after an expiry of a period of limitation.
>
> I think the right way to approach the problem of the exercise of discretion here is to consider whether the court would have given leave to issue a writ against the Utrecht on 7 April 1972, the two-year period having expired on 24 April 1971.

He then went on to consider the relevant facts before him, and having regard to the unusual circumstances in that case he said he would be disposed to exercise his discretion to grant an extension of time, if the application had been made in early August 1971; but he concluded that after a passage of eight months since the beginning of August 1971 the lapse of time 'was too long and unjustified to warrant the exercise of the statutory discretion'. He therefore struck out the amendment and set aside the service of the writ on the 'Utrecht'.

In the instant case, we do not have such a statutory discretion for granting an extension of time. A fortiori, having regard to the nature of an action in rem and the lapse of the contractual period of limitation, leave for the amendment ought to be refused, and, accordingly, the amendment ought to be struck out. In the result, we allow the appeal and set aside that part of the order of the learned judge appealed against and restore the part of the order of the registrar set aside by the learned judge. The appellants will have their costs here and below, and the amount deposited in court as security for costs is to be repaid to them or their solicitors.

Appeal allowed.

Solicitors: *Godwin & Co; Niru & Co.*

Reported by *Terence Tan Bian Chye*

United Bank Ltd v Banque Nationale de Paris & Anor

COURT OF APPEAL (SINGAPORE) - CIVIL APPEAL NO 77 OF 1987
LAI KEW CHAI, THEAN AND CHUA JJ
1 AUGUST 1989

Civil Procedure - Merger - Doctrine of - Election - Whether unsatisfied judgment against the applicant for the letter of credit precluded an action against the advising bank and negotiating bank

Banking - Letter of credit - Payment under letter of credit to wrong party by negotiating bank - Letter of credit of opening bank debited for amount by negotiating bank - Suit against applicant for letter of credit for indemnity under terms of letter of credit agreement - Suit against negotiating bank for breach of letter of credit terms and for negligence - Suit against advising bank for breach of contract and for negligence in failing to transmit amended instructions to beneficiary - Judgment against beneficiary - Whether suit against others precluded - Uniform Custom and Practices for Documentary Credits (1974 Revision) ICC Publication No 290, art 12

The plaintiffs (appellants) are a bank. By an agreement in writing ('the agreement') between the plaintiffs and the third defendant ('the buyer'), the plaintiffs agreed to issue a letter of credit in favour of a beneficiary to the sum of US$220,000 and the buyer agreed to reimburse the plaintiffs the amount due under the letter of credit or any charges and expenses incurred by the plaintiffs by reason of the establishment and/or negotiation or payment under the letter of credit. A letter of credit was then issued in favour of the beneficiary according to the terms of the agreement. The letter of credit was expressed to be subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision). The plaintiffs appointed the second defendants, the Hongkong & Shanghai Banking Corporation ('HSBC') as the advising bank for the purpose of transmitting the letter of credit to the beneficiary. The buyer later requested the plaintiffs to amend the letter of credit by imposing additional conditions, one of which was that documents should include a certificate stating that the goods shipped are in order. The plaintiffs airmailed the amendments to HSBC which HSBC transmitted to the beneficiary. The first defendants, Banque Nationale de Paris, who are the first respondents, were the negotiating bank. They negotiated the letter of credit and paid a sum of US$220,000 to a company which had the same address as the beneficiary, after that company had presented various documents. The plaintiffs alleged, inter alia, that the documents presented did not include

the certificate, and that the company was not the beneficiary named in the letter of credit. Having paid the company the amount, BNP debited the account of the plaintiffs with that amount to reimburse themselves.

The plaintiffs therefore brought this action against BNP for reimbursement of US$220,000 and/or damages and interest. The action against HSBC was for damages and interest, while the action against the buyer was for the sum of US$220,000 and interest and/or a declaration of their right to be indemnified by the buyer. The plaintiffs obtained default judgment against the buyer, but since the plaintiffs failed to obtain satisfaction of the judgment, they proceeded with the action against BNP and HSBC.

Before the High Court, the judge heard BNP's argument that the plaintiffs' claim against the three defendants were alternative claims and as the plaintiffs had entered judgment in default against the buyer, they had elected not to proceed with the claim against the other two defendants. The judge agreed and dismissed the action. (Although he did not say so, the Court of Appeal found that it was implicit in his judgment that the default judgment entered against the buyer was equivalent to an election which barred further proceedings against BNP and HSBC.) Against this, the plaintiffs appealed. BNP claimed that the plaintiffs by suing the buyer for reimbursement of the amount paid by BNP did so on the basis that BNP in making the credit had duly complied with the terms of the letter of credit. Taking judgment against the buyer therefore barred the claim against BNP. BNP also claimed that under cl 7 of the agreement (all references to clauses are to clauses in the agreement) which provided, inter alia, '... the undersigned [the buyer] assumes all risks of act of any person using the said credit who are hereby accepted as the agents of the undersigned ...'. It was said that by this clause, the plaintiffs and the buyer agreed that anyone using the credit would be accepted as an agent of the buyer. It was therefore argued that since the plaintiffs had obtained judgment against the buyer, the principal, they could not then pursue their claim against the agent, BNP. HSBC claimed that in obtaining judgment against the buyer, the plaintiffs had both affirmed and ratified the acts of HSBC and were therefore precluded from claiming against HSBC.

Held, allowing the appeal:

(1) It was first necessary to examine the statement of claim to determine the true nature of the plaintiffs' claim against each of the defendants.

(2) The claim against the buyer is one based purely on the terms of the agreement and the letter of credit. In particular, the provision for reimbursement in the agreement was relied on. Clause 7 in the agreement was an all-embracing provision which exempted the plaintiffs from all liabilities arising from acts of any person using the credit in the numerous events specified and it imposed on the buyer an obligation to hold the plaintiffs harmless from any loss or damage in respect of the matters specified. Article 12 paras (a) and (b) of the Uniform Customs and Practices for Documentary Credits (UCP) was also relied upon.

(3) The claim against BNP was in contract as well as in tort. The plaintiffs claimed that BNP in breach of the terms of the letter of credit paid money to a person who was not the beneficiary under the letter of credit, and that BNP was therefore liable to refund or reimburse the amount to the plaintiffs. They also claimed that BNP was negligent in negotiating the letter of credit and making payment thereunder.

(4) The plaintiffs claimed that HSBC had been appointed by the plaintiffs as advising bank for the purpose of transmitting the credit to the beneficiary and in that capacity, HSBC was in breach of contract in failing to forward to the beneficiary the amendments to the letter of credit with reasonable diligence and were negligent. The claim against HSBC was in contract and in tort.

(5) It was clear that the plaintiffs' claims against the three defendants are not joint. They are several and are founded on separate and distinct causes of action against the respective defendants. As far as the claims in contract are concerned, they arose out of different and separate contracts between the plaintiffs and the respective defendants; each cause of action is separate and distinct. The torts of negligence allegedly committed by BNP and HSBC arose out of different circumstances; again each cause of action is separate and distinct.

(6) The argument that claiming reimbursement from the buyer could only be sustained on the basis that BNP had duly complied with the terms of the letter of credit was rejected as the statement of claim made no such averment. It also ignored the plaintiffs' reliance on cl 7 under which the buyer agreed to assume 'all risks of acts of any person using the said credit'.

(7) Although cl 7 does provide that all parties 'using the said credit' are accepted as agents of the buyer, they are accepted as such for the purposes of cl 7 only. Also cl 7 is res inter alios acta so far as BNP is concerned; they are not a party and cannot rely on it.

(8) Clause 7 implicitly gave the plaintiffs a right to claim against the buyer in the event of any breach of duty or negligence on the part of HSBC in addition to whatever right they might have against HSBC.

(9) The claim of the plaintiffs against the buyer is not inconsistent with that against HSBC. In no way can it be said that in initiating their claim and taking judgment against the buyer the plaintiffs had affirmed and ratified the omission or failure on the part of HSBC.

(10) Most of the cases cited by the defendants were not applicable as they concerned the relationship of principal and agent. At all material times, neither BNP nor HSBC was the agent of the buyer.

(11) The appeal was therefore allowed. The order of the High Court was set aside and the action against BNP and HSBC was directed to be tried in the High Court before another judge. The costs of the appeal and of the hearing of the preliminary issue before the High Court were to be paid by the respondents. There would be the usual consequential orders for refund to the appellants of the amount deposited as security for costs.

Cases referred to

1 *Benjamin Scarf* v *Alfred George Jardine* (1882) 7 App Cas 345 (distd)
2 *Morel Brothers & Co Ltd* v *Earl of Westmoreland & Wife* [1903] 1 KB 64 (distd)
3 *Moore* v *Flanagan & Wife* [1920] 1 KB 919 (distd)
4 *Verschures Creameries Ltd* v *Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608 (distd)
5 *United Australia Ltd* v *Barclays Bank Ltd* [1941] AC 1 (refd)

KS Chung (*Mirza Mohd Namazie* with him) for the appellants.

HE Cashin (*Dr Myint Soe* with him) for the first respondents.

Joseph Ang (*Lee Han Tiong* with him) for the second respondents.

Cur Adv Vult

Thean J (delivering the judgment of the court): The plaintiffs, who are the appellants, are a bank in Abu Dhabi, United Arab Emirates. By an agreement in writing made in October 1980 ('credit agreement') between the plaintiffs and the third defendant ('the buyer'), the plaintiffs agreed to issue a letter of credit in favour of Pan Associated Ltd ('the beneficiary') of Suite 1908A, 19th Floor, International Plaza, Anson Road, Singapore in the sum of US$220,000 and the buyer agreed to reimburse the plaintiffs the amount due under the letter of credit or any charges and expenses incurred by the plaintiffs or their correspondents by reason of the establishment and/or negotiation or payment under the letter of credit. Pursuant to the credit agreement a letter of credit ('the letter of credit') was issued on 1 November 1980 in favour of the beneficiary in the sum of US$220,000. The letter of credit was expressed to be subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision) ICC Publication No 290 ('UCP').

The plaintiffs appointed the second defendants, The Hongkong and Shanghai Banking Corporation ('HSBC'), who are the second respondents, as the advising bank for the purpose of transmitting the letter of credit to the beneficiary. On 1 November 1980 the plaintiffs sent to HSBC a cable advice of the opening of the credit and sent by airmail the letter of credit. Subsequently, on or about 6 November 1980, the buyer requested the plaintiffs by cable to amend the letter of credit and the amendments consisted of the following additions:

(a) 'Documents should include certificate from Messrs Naraina Trading (Pte) Ltd ... stating that the goods shipped are in order', and
(b) 'One percent empty bags must be supplied free of charge'.

The plaintiffs airmailed the amendments to HSBC on or about the same day, and also telexed the same to them on or about 9 November 1980. HSBC received the telex on the same day and the airmailed letter of credit on 11 or 12 November and the airmailed amendments on or about 20 November 1980. HSBC said that they advised the beneficiary of the opening of the credit on 3 November, transmitted the credit to them (the beneficiary) on 12 November and informed them of the amendments on or about 20 or 24 November 1980.

The first defendants Banque Nationale de Paris ('BNP'), who are the first respondents, were the negotiating bank; they negotiated the letter of credit on or about 19 November 1980 and paid a sum of US$220,000 to or to the credit of Pan Associated Pte Ltd ('Pan'), which is a company incorporated in Singapore and having the same address as the beneficiary, on presentation by Pan of various documents. However, the plaintiffs alleged that the documents presented did not include the certificate from Naraina Trading (Pte) Ltd; nor did they comply with the amendments made to the letter of credit as required by the buyer. Having paid Pan the amount BNP debited the account of the plaintiffs with that amount to reimburse themselves. According to the plaintiffs, Pan was not the beneficiary named in the letter of credit.

The plaintiffs therefore brought this action against BNP, HSBC and the buyer claiming as follows:

(a) against BNP, the sum of US$220,000 and/or damages and interest;
(b) against HSBC, damages and interest; and
(c) against the buyer, the sum of US$220,000 and interest and/or a declaration of their right to be indemnified by the buyer.

The claim was resisted by BNP and HSBC, each separately represented, and their respective defences were filed and delivered. The buyer, however, after having been served, failed to enter an appearance and a default judgment was entered against him on 10 March, 1983. The plaintiffs not having obtained satisfaction of the judgment proceeded further with the action against BNP and HSBC.

The action eventually came on for hearing before the High Court. At the commencement of the hearing, Mr Cashin for BNP raised a preliminary point. He submitted that the claims against BNP, HSBC and the buyer were alternative claims, and as the plaintiffs had entered judgment in default against the buyer, the plaintiffs had thereby elected not to proceed with the claims against BNP and HSBC, and, in consequence, were precluded from claiming against BNP and HSBC. Counsel for HSBC associated himself with that submission. That argument found favour with the learned trial judge and he dismissed the claims of the plaintiffs against BNP and HSBC. The learned trial judge held that the claims of the plaintiffs against the three defendants were not joint but in the alternative. It is implicit in his judgment (though he did not expressly say so) that the default judgment entered against the buyer was equivalent to an election which barred further proceedings against BNP and HSBC. He found support for his conclusion in the following authorities: *Benjamin Scarf* v *Alfred George Jardine*,[1] *Morel Brothers & Co Limited* v *Earl of Westmoreland & Wife*[2] and *Moore* v *Flanagan and Wife*.[3] The learned trial judge also relied on the following passage from Bullen & Leake's *Precedents of Pleadings* (12th Ed) at p 104:

> Where, however, two defendants are sued on a claim on which the plaintiff has a right of action alternatively, but not jointly or severally, a default judgment against one of them is equivalent to an election to sue that one, and a bar to further proceedings on the other.

and also the following statement of law from Odgers' *Principles of Pleading & Practice* (22nd Ed) at p 187:

> Where two persons are liable in the alternative, judgment against one is a bar to an action against the other (*Morel Brothers*).

Against the decision of the High Court this appeal is now brought. The issue before us is whether (i) the claim against the buyer and (ii) the claims against BNP and HSBC are alternative in the sense that they are mutually inconsistent so that taking judgment in default against the buyer by the plaintiffs amounted to an election which bars further proceedings against BNP and HSBC or either of them.

It is necessary in the first place to examine the statement of claim in some detail so as to determine the true nature of the plaintiffs' claim against each of the three defendants. The claim against the buyer is one purely based on the terms of the credit agreement and the letter of credit. In particular, in para 1 of the statement of claim the plaintiffs relied on the provision for reimbursement (appearing on the face of the agreement) which is in the following terms:

> I/We hereby declare that the above goods will be shipped to a Gulf Port. I/We shall be *bound to reimburse to you the amount due or any other charges and expenses incurred by you and your correspondents by reason of establishment and/or negotiations or payments under the letter of credit established under these instructions.*
>
> This credit shall be deemed to have been issued when advice thereof has been despatched to the beneficiaries.
>
> In consideration of your opening an irrevocable letter of credit on the above terms and conditions *I/we unconditionally agree as per terms and conditions overleaf.* (Emphasis added).

Of the terms and conditions 'overleaf', the plaintiffs relied only on cl 7 ('cl 7') which is extremely involved and prolix, and it is best to set out below the whole of this lengthy clause verbatim:

> *The undersigned [the buyer] assumes all risks of acts of any person using the said credit who are hereby accepted as the agents for the undersigned, together with all responsibility for the character, kind, quality, quantity, delivery or existence of the merchandise purporting to be represented by any document* and/or for any difference of character, quality or quantity of merchandise shipped under this credit from that expressed in any invoice accompanying any of the said drafts and/*or for the validity, genuineness, sufficiency from or correctness of any documents, even if such documents should, in fact, prove to be in any or all respects incorrect, defective, irregular, fraudulent or forged* and/or for time, place, manner or orders in which shipment is made, and/or for partial or incomplete shipment, and/or *for failure or omission to ship any or all of the merchandise, referred in the credit* and/or for the character, adequacy validity or genuineness of any insurance, or policy or certificate of insurance of the solvency or responsibility of any insurer, or any other risk connected with insurance and/or for any delay, default, fraud, or deviation from instructions of the shipper or any one else in connection with the merchandise or the shipping or other documents with respect thereto and/or for delay in arrival or failure to arrive either of the merchandise or any of the said documents and/or for any breach of contract between the shippers or vendors and *the undersigned hereby agree not to claim from you damages or hold you [the plaintiffs] in any manner responsible for any delay or oversight or mistake or negligence on your part or on the part of any of your agents or sub-agents in issuing the credit or in complying with any instruction of the undersigned or otherwise in relation to the applications of the said credit, and the undersigned will hold you* (viz the plaintiffs) *harmless from all loss or damage in respect of any such matters and from any and all damage and loss, whatsoever suffered by you by reason of any and all action taken by you or your correspondent in good faith in furtherance of your above request or due to errors, omissions, interruptions or delays in transmission or delivery, of any and all messages, by mail, cable, telegraph or wireless, whether or not the same be in cypher.* If the above instructions request you to establish the credit by cable, I/we shall feel obliged by your sending such cable through your correspondent or otherwise, either literally or in cypher, and it is understood that this cable is sent entirely of my/our risk and that you are not to be held liable either for any mistake or omission which may happen in the transmission of the message or for its misinterpretation when received; also that in case of incorrect or overpayment, by reason of any such error you will hold me/us responsible for the amount thus paid in excess or otherwise. (Emphasis added).

This all embracing provision is, in effect, firstly, an exemption clause seeking to relieve the plaintiffs from all liabilities arising from acts of any person using the credit in the numerous events therein specified and, secondly, an indemnity clause imposing on the buyer an obligation to hold the plaintiffs harmless from all loss or damage in respect of the matters as therein provided. In addition to these provisions, the plaintiffs also relied on art 12 of UCP which (so far as relevant) by paras (a) and (b) provide as follows:

> (a) Banks utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of the latter.
>
> (b) Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank.

On the basis of all these provisions the plaintiffs averred that they were entitled to be indemnified and/or reimbursed by the buyer and claimed against him for US$220,000 and interest and/or a declaration of their right to be indemnified by him: see para 13 of the statement of claim. Clearly, the plaintiffs' claim against the buyer is one in contract.

We now turn to the claim of the plaintiffs against BNP, which is set out in paras 10 and 11 of the statement of claim, namely:

> 10 The first defendants as negotiating bankers were in breach of the terms of the contract contained in or evidenced by the letter of credit and/or in breach of a duty of care owed, inter alia, to the plaintiffs in so negotiating the credit and in

effecting payment to a person other than the beneficiary named in the credit, and in purporting to reimburse themselves by drawing upon the plaintiffs' account as stipulated in the credit. The first defendants would have appreciated, if they had acted in accordance with their duties under the contract contained in or evidenced by the letter of credit and/or if they had exercised reasonable skill and care and/or examined the documents presented with reasonable care, that Pan were not the same legal entity as the named beneficiary, and not entitled to payment under the letter of credit, and/or that they were not being presented with drafts or bills drawn by the named beneficiary or with the named beneficiary's invoices or shipment advices.

11 In the premises, and/or under the terms of the UCP, the plaintiffs are entitled to be reimbursed by the first defendants with the sum of US$220,000, plus interest, and/or the plaintiffs have suffered loss and damage in that amount by reason of the first defendant's breach of contract and/or duty and/or negligence. The plaintiffs will contend, as their primary case, that negotiation to the wrong person is a matter outside the scope of art 8 of the UCP. Alternatively, by their telexes to the first defendants of 30 November 1980, and/or 4 December 1980, the plaintiffs complied with art 8(E) of the UCP (if applicable) so as to preserve or establish their right to be reimbursed by the first defendants.

By these averments, the plaintiffs claimed that BNP in breach of the terms of the letter of credit paid the sum of US$220,000 to a person who, the plaintiffs said, was not the beneficiary under the letter of credit, and that BNP were therefore liable to refund or reimburse the amount to the plaintiffs. They also claimed against BNP for damages for negligence in negotiating the letter of credit and making payment thereunder. The claim against BNP is therefore one in contract as well as in tort.

As against HSBC, the plaintiffs claimed that HSBC were appointed by the plaintiffs as advising bank for the purpose of transmitting the credit to the beneficiary and in that capacity HSBC were in breach of contract in failing to forward to the beneficiary the amendments to the letter of credit with reasonable diligence and were negligent. The claim is set out in para 12 of the statement of claim, which is as follows:

Further or alternatively, the second defendants owed a duty to the plaintiffs under the contract contained in or evidenced by the letter of credit and/or as agents of the plaintiffs and/or at common law to exercise reasonable diligence skill and care as advising bankers in promptly advising the beneficiaries and/or their bankers of requested amendments to the letter of credit and/or in seeking agreement to such amendments, and were in breach of such contract and/or duty and/or were negligent, whereby the plaintiffs have suffered loss and damage.

Immediately beneath this paragraph are set out the particulars of the breaches and/or negligence of HSBC. The claim against HSBC is also one in contract as well as in tort.

It is clear that the plaintiffs' claims against the three defendants are not joint; they are several and are founded on separate and distinct causes of action against the respective defendants. The cause of action against the buyer is in contract, ie the credit agreement and the letter of credit; as against BNP, the plaintiffs have two causes of action: one in contract, ie the letter of credit, and another in tort, ie negligence, and likewise as against HSBC, the plaintiffs have a cause of action in contract, ie the contract of agency, and another in tort, ie negligence. In so far as the causes of action in contract are concerned, they arose out of different and separate contracts between the plaintiffs and the respective defendants; each cause of action is separate and distinct. The torts of negligence alleged by the plaintiffs to have been committed by BNP and HSBC arose out of different circumstances; again each cause of action is separate and distinct. In other words, vis-a-vis the plaintiffs, the buyer, BNP and HSBC are not joint contractors; nor are BNP and HSBC joint tortfeasors.

We now turn to the issue before us, ie whether (i) the claim against the buyer and (ii) the claims against BNP and HSBC are alternative in the sense that they are mutually inconsistent so that taking judgment in default against the buyer by the plaintiffs amounted to an election which bars further proceedings against BNP and HSBC or either of them.

Mr Chung for the plaintiffs contended that the plaintiffs' claims against the three defendants were not mutually inconsistent. There was nothing inconsistent in the plaintiffs having at one and the same time the several claims as follows: against the buyer, as their customer, a claim for reimbursement of the amount of US$220,000, an indemnity or damages under a contract; against BNP, as the negotiating bank, a claim also for reimbursement of the amount and damages under a contract, but a different contract, and for damages for negligence, and against HSBC, as the advising bank, a claim for damages under yet another different contract and for damages for negligence. Each claim against each defendant was made under a different contract and the cause of action against each was distinct. There was no relationship between the three defendants. All these claims were several, and the plaintiffs were entitled to pursue them at one and the same time in one action. If the claims against the three defendants had been tried and the plaintiffs succeeded in establishing their claims, they would be entitled to judgment against all three of them. Of course in such a case, satisfaction of the judgment by one of the defendants would preclude the plaintiffs from enforcing the judgment against the others; the plaintiffs could not recover the amount more than once. Mr Chung also contended that there was no inconsistency whatsoever between the facts asserted against the buyer, on which the claim was based and the default judgment was entered, and the facts which were asserted against BNP and HSBC respectively. We can see the force of these arguments and do not think there is any answer to them.

Mr Cashin for BNP advanced two arguments in his contention that the claim against the buyer was mutually inconsistent with that against BNP. His first argument is this. There was an inconsistency in the courses of action taken by the plaintiffs against BNP and the buyer and the inconsistency arose in this way. The plaintiffs claimed against BNP, and in this claim, they maintained that BNP in negotiating the letter of credit did not comply with the terms thereof and, in consequence, made payment to a party who was not the beneficiary, ie a wrong party. If such a claim was established, BNP, and not the buyer, would be liable to the plaintiffs. But, the plaintiffs also claimed against the buyer for reimbursement of the amount paid by BNP, and this claim could only be sustained on the basis that BNP in making payment had duly complied with the terms of the letter of credit. Therefore, having taken judgment - albeit default judgment - against the buyer the plaintiffs could no longer maintain that BNP had not duly complied with the terms of the letter of credit and made payment to a wrong party. Taking judgment against the buyer amounted to an election which barred the plaintiffs from pursuing their claim against BNP. This argument, we are unable to accept; it ignores the precise way in which the claim against the buyer was framed. Their claim was made on the basis that the buyer was obliged under the terms of the credit agreement and letter of credit to reimburse the plaintiffs the amount of US$220,000. In their claim against the buyer, apart from the main provision (on the face of the credit agreement), they relied also on cl 7 under which the buyer agreed to assume 'all risks of acts of any person using the said credit'. They pleaded, and it is their case, that BNP had made payment under the letter of credit to a wrong party - a party who was not the beneficiary - but, that notwithstanding, the plaintiffs said - and it is implicit in their statement of claim - that they were still entitled under the terms of the credit agreement and the letter of credit to reimbursement or to be indemnified by the buyer. There is no averment by the plaintiffs in the statement of claim to the effect that only if it is determined that Pan is, in truth, the beneficiary, would the buyer be obliged to reimburse the plaintiffs the amount paid to Pan. Nor can such averment be implied.

The next argument advanced by Mr Cashin - which according to him is a far stronger one - is this. Clause 7 in the credit agreement expressly provides, inter alia, '... the undersigned [the buyer] assumes all risks of acts of any person using the said credit who are hereby accepted as the agents of the undersigned ...'. By this clause, the plaintiffs and the buyer agreed that anyone using the credit would be accepted as an agent of the buyer. BNP were the negotiating bank and had used the credit and were thereby constituted the agent of the buyer. It therefore followed, said Mr Cashin, that since the plaintiffs had obtained judgment against the buyer, the principal, they could not then pursue their claim against BNP, the agent. We again are unable to accept this argument. It is wholly misconceived. First, though cl 7 does provide that all parties 'using the said credit' are accepted as agents of the buyer, they are accepted as such agents for the purposes of cl 7 only. Secondly, what cl 7 provides is essentially a matter between the plaintiffs and the buyer and cannot have any effect on the relationship as between the plaintiffs and BNP. The credit agreement is res inter alios acta so far as BNP are concerned; they are not a party to it and cannot rely on it. It is utterly inconceivable that in negotiating the letter of credit BNP acted in any way as an agent of the buyer. There was a contract directly between the plaintiffs, the issuing bank of the letter of credit, and BNP, the negotiating bank. Having negotiated and made payment under the letter of credit, BNP looked to the plaintiffs for payment or reimbursement. In this case, BNP reimbursed themselves by drawing on the plaintiffs' account with them. There was no contractual relationship between BNP and the buyer.

Mr Ang for HSBC submitted that since the plaintiffs had taken judgment against the buyer there was an inconsistency on their part in pursuing their claim against HSBC. The plaintiffs' complaint against HSBC was that the latter were in breach of contract in that they failed to forward the amendments to the letter of credit with due diligence and/or that they were negligent. But in obtaining judgment against the buyer the plaintiffs had both affirmed and ratified the acts of HSBC, and hence were precluded from claiming against HSBC. In support, Mr Ang relied on *Verschures Creameries Ltd* v *Hull and Netherlands Steamship Company Ltd*,[4] which, he submitted, was on all fours with the instant case. In that case, a forwarding agent was instructed by the plaintiffs to deliver goods to a consignee, but later, before delivery, the instructions were revoked. The agent nevertheless delivered the goods to the consignee. The plaintiffs then invoiced the goods to the consignee, sued him for the purchase price and obtained judgment against him. However, they failed to get satisfaction, and then proceeded to sue the forwarding agent for breach of duty as agent and for negligence. It was held that upon the wrongful delivery made by the forwarding agent the plaintiffs had two courses of action: they could refuse to recognize the unauthorized delivery and sue the forwarding agent for conversion or breach of duty or in the alternative they could recognize and adopt the delivery made by the agent and sue the consignee for the price of the goods sold and delivered. They had a right to elect; they elected to sue the consignee to judgment. Having so elected to sue the consignee for the price of the goods and treated the delivery as an authorized delivery they could not treat the same act as misdelivery and sue the agent for the goods.

Mr Ang's argument, in our view, is also misconceived. As we have said, the plaintiffs based their claim

against the buyer wholly on the credit agreement and the letter of credit, and their claim was that the buyer was obliged thereunder to reimburse them the amount of US$220,000. They relied on, inter alia, cl 7, and in relation to the alleged breach of contract and negligence on the part of HSBC, they obviously relied on that part of cl 7 under which the buyer expressly agreed to hold them harmless from all loss or damage suffered by them 'by reason of any and all action taken by ... your correspondent in good faith ... due to errors, omissions ... or delays in transmission or delivery of any and all messages by mail, cable ...'. It is implicit in the statement of claim that as against the buyer that clause gives to the plaintiffs a right to claim against the buyer in the event of any breach of duty or negligence on the part of HSBC in addition to whatever right they have or may have against HSBC. In our judgment, the claim of the plaintiffs against the buyer is not inconsistent with that against HSBC; in no way can it be said that in initiating their claim and taking judgment against the buyer the plaintiffs had affirmed and ratified the omission or failure on the part of HSBC. Clearly, the factual situation in the instant case (on the basis of the pleadings) is different from that in *Verschures Creameries*.[4] That case therefore does not assist or support the argument advanced on behalf of HSBC.

We now turn to examine the three cases, namely, *Benjamin Scarf* v *Alfred George Jardine*,[1] *Morel Brothers & Co Ltd* v *Earl of Westmoreland & Wife*[2] and *Moore* v *Flanagan and Wife*,[3] which were cited and relied upon in the court below, to see if they are applicable here or are of any assistance to the respondents. In *Scarf* v *Jardine*,[1] a firm of two partners was dissolved; one partner, Scarf, retired, and the other, Rogers, carried on the business with a new partner, Beech, under the same name and at the same place. The plaintiff was a customer of the old firm and was not aware of the change and supplied goods to the new firm. He was later informed of the change and thereafter continued to supply goods to the new firm. Subsequently, the firm defaulted in payment and he commenced an action against Rogers and Beech. The action was stopped, as the new firm went into bankruptcy and the plaintiff proved as creditor of the new firm. Thereafter, not receiving satisfaction of the debt, he commenced an action against Scarf. It was held by the House of Lords that the liability of Scarf was one of estoppel and not jointly with the partners of the new firm, the latter being liable on the facts, and that the plaintiff might at his option sue Scarf or the partners of the new firm but not all three of them, and that having elected to sue the partners of the new firm he could not afterwards sue Scarf. The reasoning for this was clearly set out by Lord Selborne LC in his speech at p 350:

> Now it appears to me that the real question which your Lordships have to determine is ... whether in that state of circumstances there was a concurrent joint liability of the three persons, Scarf, Rogers, and Beech, upon the principles which I have stated; or whether the plaintiff had a right to make his choice whether he would sue those who were liable by estoppel, or sue those who were liable upon the facts. Put it as I can I am unable to understand how there could have been a joint liability of the three. The two principles are not capable of being brought into play together: you cannot at once rely upon estoppel and set up the facts; and if the estoppel makes A and B liable, and the facts make B and C liable, neither the estoppel nor the facts, nor any combination of the two can possibly make A, B, and C all liable jointly.

The principles as stated can have no application here and the case can be of no assistance and does not support the case of the respondent.

In *Morel Brothers*,[2] an action was brought against the Earl and Countess Westmoreland in respect of necessaries supplied by the plaintiffs upon the order of the countess. Judgment for the amount claimed was entered against the countess who did not defend the action. The plaintiffs pursued their claim against the earl and the claim was on the footing of a joint liability of the husband and wife. The Court of Appeal held that it was not a case of joint liability of the defendants, and if the claim made against the countess were treated as several it could only be made on the basis of her being a principal in respect of the contract for the goods supplied. In such a case, the plaintiffs having obtained judgment against her on the footing that she was severally liable as principal could not turn round and say she was the agent for the husband as the principal. Collins MR said, at p 76:

> ... I have dealt with the question of a joint liability; but, upon the plaintiffs' contention that for this purpose the action is to be treated as one against the defendants severally or in the alternative, we must deal with the claim against the countess as made against her severally as being herself a principal in respect of the contract for the goods supplied. The plaintiffs, having obtained judgment against the countess on the footing that she was severally liable as the principal, cannot now turn round and say that she was an agent for the purpose of imposing liability upon her husband as the principal. In this point of view the liability of the husband and wife is not joint, but the liability of one is inconsistent with the liability of the other. In such a case, if it is sought to render the agent liable, it must be by treating the agent as a principal, to the exclusion of the liability of the real principal. If it is sought to render the real principal liable, then the agent must be treated as such and not as principal. The plaintiffs cannot recover against both.

The decision of the Court of Appeal, on appeal, was affirmed by the House of Lords. That was a classic case of inconsistent claims against principal and agent. Lord Halsbury LC at the commencement of his speech said, at p 14:

> My Lords, the plaintiffs might have sued either the agent or the principal. I prefer keeping to those terms because it gets rid of the confusion which arises from the peculiar relation of these parties to each other. The result was that the plaintiffs got judgment against the agent. They cannot get judgment against the principal also. It is an alternative remedy; it cannot be made available against the two.

This clearly is not the case here. As we have held, there was no relationship at all material times between the buyer of the one part and BNP and HSBC of the other; neither BNP nor HSBC were at any material time the agent of the buyer.

Moore v *Flanagan*[3] is another case of a claim being brought against a husband and wife for price of goods supplied to the wife. Judgment under O 14 was signed against both of them, and on appeal by the husband, the judgment against him was set aside. Subsequently, at the trial of the action against the husband the judge found that there was no joint liability of the husband and wife, and that the goods supplied being necessaries the husband was the principal and the wife the agent, and he held that the plaintiff had not by the judgment against the wife elected to treat her as principal and was entitled to recover against the husband. On appeal, the Court of Appeal following *Morel's* case[2] held that the plaintiff having signed judgment against the agent could not afterwards recover against the principal in respect of the same debt. Bankes LJ said, at p 923-924:

> ... Taking the judgments in the Court of Appeal and in the House of Lords in *Morel's* case they seem to me to rest upon this principle. If a person has a claim against two other persons, one of whom is in fact an agent for the other, and judgment is signed against the one who turns out to be the agent, that is a conclusive bar to an action against the principal.

That again was a case of a claim against principal and agent and is of no assistance to us in the instant case.

We were referred to numerous cases by Mr Chung; however, we need to mention only the case of *United Australia Ltd* v *Barclays Bank Ltd*,[5] which is of some assistance. There, a cheque payable to the plaintiff was converted by a company ('MFG'), and collected for that company by the defendant bank. The plaintiff brought an action against MFG for the amount of the cheque either as money lent or as money had and received to the use of the plaintiff. MFG subsequently went into liquidation and the plaintiff submitted a proof in liquidation for money lent but the proof had not yet been admitted. The plaintiffs then brought an action against the bank. It was held that by initiating the action against MFG the plaintiff had not waived the tort against the bank. Viscount Simon LC said, at p 19:

> ... I am quite unable to see why this second action should be barred by the plaintiff's earlier proceedings against MFG. In the first place, the tort of conversion of which the bank was guilty is quite a separate tort from that done by MFG. MFG's tort consisted in taking the cheque away from the appellants without the appellants' authority; that tort would have equally existed if MFG, instead of getting the cheque cleared through the bank, had kept it in its own possession. The bank's tort, on the other hand, consisted in taking a cheque, which was the property of the appellants, and without their authority using it to collect money which rightly belonged to the appellants. MFG and the bank were not joint tortfeasors, for two persons are not joint tortfeasors because their independent acts cause the same damage.

Similarly, in the instant case, the claim of the plaintiffs against the buyer is wholly in contract; that against BNP is in contract (which is a different contract) and in tort, and the claim against HSBC is in contract (which is yet another different contract) and in tort. It is true that in *United Australia*,[5] the plaintiff had not obtained judgment against MFG, but even if it had, that would not carry the defence of the bank any further. Viscount Simon LC said, at p 21:

> To avoid misunderstanding, I must add that I do not think that the respondents in the present case would escape liability, even if judgment had been entered in the appellant company's earlier action against MFG. What would be necessary to constitute a bar, as Bayley J pointed out in *Morris* v *Robinson*, would be that, as the result of such judgment or otherwise, the appellants should have received satisfaction.

Lord Atkin in his speech held that the plaintiff made no election to claim in contract and not in tort. He said, at p 31:

> In the present case, therefore, I find that the plaintiffs were at no stage in the proceedings they took against MFG Trust called to make an election, and, if it were necessary so to hold, in fact made no election, to claim in contract and not to claim in tort: and the foundation of the defendant's defence disappears. But I think it necessary to add that even if the tort had been waived, or the plaintiff had made any final election against MFG Trust Ltd, I fail to see why that should have any effect upon their claims against the bank. If a thief steals the plaintiff's goods worth £500 and sells them to a receiver for £50 who sells them to a fourth party for £400, if I find the thief and he hands over to me the £50 or I sue him for it and recover judgment I can no longer sue him for damages for the value of the goods, but why should that preclude me from suing the two receivers for damages.

In our judgment, the claims of the plaintiffs against the three defendants are several, and the claim against the buyer is not inconsistent with those against BNP and HSBC or either of them. The plaintiffs in entering judgment against the buyer are not barred from pursuing their claims against BNP and HSBC or either of them.

This appeal therefore must succeed, and is allowed. We set aside the order of High Court and direct that the action against BNP and HSBC be tried in the High Court before another judge. The costs of this appeal and of the hearing of the preliminary issue before the High Court are to be paid by the respondents. There will be the usual consequential order for refund to the appellants of the amount deposited as security for costs.

Appeal allowed.

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Reported by *Terence Tan Bian Chye*